Supreme Court, U.S.
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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MAX PIEVSKY,

Petitioner,

v.

THOMAS J. RIDGE,
in his capacity as the Governor of the
Commonwealth of Pennsylvania,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Under federal law, may a government official appointed for a fixed term of years be removed prior to the end of his term solely at the will of the appointing authority?

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Petitioner, Max Pievsky, respectfully petitions this Court to issue a writ of certiorari to review the October 16, 1996 judgment of the United States Court of Appeals for the Third Circuit, affirming a judgment of the United States District Court for the Middle District of Pennsylvania that Petitioner could be removed from his position as a Commissioner of the Delaware River Port Authority prior to the expiration of Petitioner's five-year term of office, solely at the will of Respondent, the Governor of Pennsylvania.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is published as *Pievsky v. Ridge*, 98 F.3d 730 (3d Cir. 1996) and is reprinted in the appendix attached hereto ("Appendix") at 1a.[1] The district court's opinion and order granting judgment in favor of respondent is published at *Pievsky v. Ridge*, 921 F.Supp. 1335 (M.D. Pa. 1996) and is reprinted in the Appendix hereto at 17a.

JURISDICTION

The Court of Appeals issued its opinion on October 16, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Compact Clause of the Constitution of the United States, U.S. Const., Article I, § 10, Cl. 3, provides in pertinent part that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State. . . ."

The relevant provisions of the Delaware River Port Authority Compact ("DRPA Compact"), as amended, an interstate compact between the Commonwealth of Pennsylvania and the State of New Jersey, involve the procedures for appointing Commissioners to the Port Authority by the Commonwealth of Pennsylvania:

> Six of the eight commissioners for the Commonwealth of Pennsylvania shall be appointed by the Governor of Pennsylvania for terms of five years. The Auditor General and the State Treasurer of said Commonwealth shall, ex-officio, be commissioners for said Commonwealth, each having the privilege of appointing a representative to serve in his place at any meeting of the commission which he does not attend personally.

DRPA Compact, Article II, 36 P.S. § 3503. The full text of the DRPA Compact is set forth at 36 P.S. § 3503 and is reprinted in the Appendix hereto at 33a.

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1. "_a" refers to the Appendix attached to this Petition.

STATEMENT OF THE CASE

This case presents no issue of disputed facts; the only issue is one of legislative intent. The findings of the court below adequately and fully state the pertinent facts. Appendix at 2a-4a. The facts, which were stipulated to between the parties, may be summarized as follows.

The Delaware River Port Authority ("DRPA") was created pursuant to the authority conferred by Delaware River Port Authority Compact ("DRPA Compact"), an interstate compact between the Commonwealth of Pennsylvania and the State of New Jersey. The DRPA Compact was agreed to in 1931 and, as required in the Compact Clause of the Constitution of the United States, U.S. Const., Art. I, § 10, Cl. 3, was approved in 1932 by the United States Congress. Act of June 14, 1932, ch. 258, 47 Stat. 308. Congress consented to the most recent amendments to the DRPA Compact by Act of Oct. 27, 1992, P.L. 102-544, 106 Stat. 3576. The DRPA was created as a "public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey" to effectuate the development and improvement of the Delaware River and Port District. DRPA Compact, Article I, 36 P.S. § 3503. The DRPA was created, among other things, to construct and operate bridges across the Delaware River, to construct and maintain facilities for the transportation of passengers between Pennsylvania and New Jersey, and to improve and develop the ports of Philadelphia and Camden. *Id.*

The DRPA has sixteen (16) commissioners, eight (8) of whom are appointed from Pennsylvania and eight (8) of whom are appointed from New Jersey. The DRPA Compact, codified in Pennsylvania at 36 P.S. § 3503, establishes the procedures for the appointment of the eight commissioners from Pennsylvania as follows:

> Six of the eight commissioners for the Commonwealth of Pennsylvania shall be appointed by the Governor of Pennsylvania for terms of five years. The Auditor General and the State Treasurer of said Commonwealth shall, ex-officio, be commissioners for said Commonwealth, each having the privilege of appointing a representative

> to serve in his place at any meeting of the commission which he does not attend personally.

DRPA Compact, Article II, 36 P.S. § 3503. The DRPA Compact provides further that:

> All commissioners shall continue to hold office after the expiration of the terms for which they are appointed or elected until their respective successors are appointed and qualify, but no period during which any commissioner shall hold over shall be deemed to be an extension of his term of office for the purpose of computing the date on which his successor's term expires.

Id.

Plaintiff was appointed initially as a Commissioner of the DRPA from October 4, 1989 until October 4, 1994 by then-Governor Casey of Pennsylvania. He was reappointed to a five-year term on December 28, 1994. Pursuant to that appointment, Mr. Pievsky was to serve a five year term through 1999. There is no provision in the DRPA Compact providing the Governor with any right to remove Mr. Pievsky from office prior to the expiration of his five-year term in 1999.

On January 23, 1996, Mr. Pievsky brought suit against respondent Governor Thomas J. Ridge (the "Governor") in the Commonwealth Court of Pennsylvania seeking to enjoin the Governor from carrying out a threat made on January 22, 1996, to remove Mr. Pievsky from his position as a DRPA Commissioner. The Governor removed that suit to federal court on January 24, 1996.

On April 12, 1996, the district court issued an order and supporting memorandum granting judgment to the Governor and holding that "federal law dictates that Defendant may remove Plaintiff [as a DRPA Commissioner] prior to the expiration of his term in 1999" ("April 12 Order"). Appendix at 31a.

Plaintiff immediately filed a notice of appeal and a motion seeking a stay of the April 12 Order pending appeal. Upon Mr. Pievsky's motion, the district court granted an

injunction in which it prohibited the Governor from removing Mr. Pievsky as a DRPA Commissioner pending resolution of an appeal to the United States Court of Appeals for the Third Circuit. On April 15, 1996, the district court issued a memorandum explaining its stay decision. On April 16, 1996, the United States Court of Appeals for the Third Circuit vacated the district court's grant of a stay pending appeal and Mr. Pievsky was removed by the Governor as a DRPA Commissioner. On April 18, 1996, Justice Souter, sitting as Circuit Justice, denied Mr. Pievsky's Application for Stay.

On October 16, 1996, the Court of Appeals affirmed the district court's decision allowing the Governor to remove Mr. Pievsky as a DRPA Commissioner prior to the expiration of Mr. Pievsky's fixed, five-year term. The Court of Appeals reasoned that

> [t]he long-standing rule in the context of federal appointments is that "[i]n the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment."

Appendix at 6a (quoting *Keim v. United States*, 177 U.S. 290, 293 (1900)). The Court of Appeals then concluded that

> [s]ince the power to removal is incident to the power to appoint, we hold that under the terms of the Compact the Governor of Pennsylvania has the authority to remove a DRPA Commissioner at will.

Appendix at 6a-7a. The Court of Appeals rejected an argument by Petitioner that, under this Court's precedent, beginning with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), a fixed term with no provision for removal cannot be interpreted to permit removal at will. Appendix at 7a. Instead, the Court of Appeals relied upon a wholly distinguishable decision of this Court and opined that

> [i]t is a long-standing rule in the federal courts that a fixed term merely provides a time for the term to end. The fixed term is merely a "cap" with the appointee removable at will. *Parsons v. United States*, 167 U.S. 324, 17 S.Ct. 880, 42 L.Ed. 185 (1897).

Appendix at 7a. In support of its decision, the Court of Appeals concluded that as a matter of policy

> the Governor's inability to remove DRPA Commissioners prior to the expiration of their terms would impede his ability to carry out his functions as Chief Executive of the Commonwealth of Pennsylvania.

Appendix at 13a.[2]

REASONS FOR GRANTING THE WRIT

The petition should be granted to resolve a conflict among the decisions of this Court. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall held that an appointment for a fixed term of years does not allow the appointee to be removed (absent some showing of cause) prior to the expiration of the fixed term. Since the landmark decision in *Marbury*, this Court has reaffirmed that decision many times, but also has issued opinions such as *Parsons v. United States*, 187 U.S. 324 (1897) and *Myers v. United States*, 272 U.S. 52 (1926), which arguably support the Court of Appeals' conclusion that a "fixed term is merely a 'cap' with the appointee removable at will." Now, as we approach the 200th anniversary of the *Marbury* opinion, this Court is presented in this petition with the opportunity to finally resolve, under federal law, the meaning of a legislative enactment of a fixed term of office without the complications of the separations of power issues that were at the heart of *Myers* and which influenced the outcome of *Parsons*.

Not only is the issue presented here of historical importance, it is of current significance because there are a number of appointments to a variety of federal agencies and Compact

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2. This conclusion by the Court of Appeals, which suggests that limits upon the Governor's removable power would be impermissible, is in sharp contrast to its finding that "[w]e agree with Pievsky's contention that the Compact is in the nature of federal law, and, under the Supremacy Clause of the U.S. Constitution, *could* limit the Governor's ability to remove his appointed officials." Appendix at 14a (emphasis in original). The Court of Appeals does not fully reconcile its apparently contradictory pronouncements regarding the scope of the Governor's removal authority vis-a-vis DRPA Commissioners.

Clause entities that provide for fixed terms, but are silent on the subject of removal. *See* Appendix at 67a (listing federal statutes and Interstate Compacts where appointees serve a fixed term, but the governing legislation is silent as to removal). In all such cases, there is, at present, uncertainty as to whether these appointees are removable at the whim of the appointing authority, or are secure in their offices for the term for which they were appointed.

THIS PETITION PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW WHERE AN APPARENT CONFLICT EXISTS IN THIS COURT'S DECISIONS

The principle that when a legislative body establishes a fixed term of office, the office holder is not removable at the will of the appointing authority, dates back at least to this Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, the Congress adopted a statute permitting the President, with the advice and consent of the Senate, to appoint justices of the peace for the District of Columbia. Such appointees, once confirmed, were "to continue in office for five years." *Id.* at 154. After the Secretary of State refused to deliver to certain duly appointed and confirmed justices their commissions of office (they had been appointed by a prior President), an action for *mandamus* was brought. The Supreme found that

> as the law creating the office gave the officer a right to hold for five years independent of the executive, the appointment was not revocable; but vested in the officer legal rights which are protected by the laws of his country.

Id. at 162. Thus, this Court concluded that, if it had jurisdiction, the issuance of *mandamus* would be proper. This Court then reached its landmark decision establishing the principle of judicial review when it found that an Act of Congress providing this Court with original jurisdiction over *mandamus* actions violated the Constitution.

The principle that a fixed term evinces a legislative intent not to permit an office holder to be removed at will was reaf-

firmed in *In re Hennen*, 38 U.S. (13 Pet.) 230 (1839), a decision that generally is cited for the proposition that the power of removal is incident to the power of appointment. The Supreme Court held that a district court judge could remove at will a clerk for whom no tenure of office was specified, since the district court judge had appointed the clerk. The Court suggested, however, that the rule would be different if the clerk had been appointed to a term fixed by statute:

> All offices, the tenure of which is ***not fixed by the Constitution or limited by law,*** must be held either during good behaviour, or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the government and subject to removal at pleasure.

In re Hennen, 38 U.S. (13 Pet.) at 259 (emphasis added).

This Court has continued to adhere to the view that officeholders with fixed terms were not subject to the maxim that the power of removal was incident to the power of appointment. In *Reagan v. United States*, 182 U.S. 419 (1901), this Court addressed whether the United States District Court for the Indian Territory could remove a commissioner for the Indian Territory who was appointed for an unspecified period. This Court concluded that such commissioners are "inferior officers, *not holding their offices for life or by any fixed tenure,* and they fall within the settled rule that the power of removal is incident to the power of appointment." *Id.* at 424 (emphasis added). In *Shurtleff v. United States*, 189 U.S. 311, 314 (1903), this Court again addressed a situation where no specific term was established. In that case, no specified term was set for the office of general appraiser, although there was language specifying causes for which an appraiser could be removed. This Court found that there was not sufficient intent expressed by Congress that an appraiser have, effectively, a life tenure, and concluded that removal at will was possible. This Court reiterated, however that "where causes of removal are specified by constitution or statute, as also where the term of office is for a fixed period, notice and hearing [prior to removal] are essential."

More recently, in two cases dealing with presidential removal authority, this Court reiterated the significance of fixed terms in deciding whether the Congress intended, and had the power, to limit the President's removal authority.[3] In *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), this Court reviewed President Roosevelt's attempt to remove a member of the Federal Trade Commission ("FTC"). FTC Commissioners were appointed for fixed terms and could be removed for "inefficiency, neglect of duty or malfeasance in office." *Id.* at 622. This Court concluded that "the fixing of a definite term subject to removal for cause . . . is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause." *Id.* at 623.[4]

This Court next addressed the issue of the presidential removal power in *Wiener v. United States,* 357 U.S. 349 (1958), which involved appointments for fixed terms, but without any provision governing removal. *Wiener* involved the War Claims Commission ("WCC"), a body responsible for making final determinations regarding awards for damage caused by the World War II enemies. Congress, in creating the WCC, limited its life to three years, but did not provide for any method of removal. As in *Humphrey's Executor,* this Court looked to both the legislation and the role of the commission as independent from the Executive to determine that Congress had the power to limit removal. *Wiener,* 357 U.S. at 356. This Court then analyzed whether Congress intended that the President have removal power and found that "no such [removal power] . . . is impliedly conferred upon [the President] simply because Congress said nothing about it." Thus, *Wiener* stands squarely for the proposition that where a legis-

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3. Despite the somewhat ambiguous language utilized by the Court of Appeals, *see supra* note 2, the instant case does not appear to present the issue of whether Congress, when it adopted the DRPA Compact, had the power to limit the removal authority of the Governor of Pennsylvania.

4. This Court then addressed a claim that Congress could not limit the President's removal power and concluded that the independent character of the FTC permitted the Congress to enact such a limitation. Based upon these findings, this Court concluded that FTC Commissioners could not be removed during their term of office except for cause. *Id.* at 632.

lative body establishes a fixed term of office, and is silent as to removal, a power of removal is not thereby implied.

Against this long line of precedent, stand two decisions of this Court upon which the Court of Appeals relied in concluding that Mr. Pievsky could be removed at the will of the Governor of Pennsylvania. The Court of Appeals' conclusion that a "fixed term is merely a 'cap' with the appointee removable at will", a conclusion directly contrary to the line of cases described above, relies upon this Court's decision in *Parsons v. United States,* 187 U.S. 324 (1897). *See also Myers v. United States,* 272 U.S. 52 (1926). In *Parsons,* this Court interpreted a series of statutes restricting Presidential removal power dating from the end of the Civil War. At the heart of the *Parsons* decision was the effect of the repeal of the Tenure of Office Act of 1867, which was passed in the aftermath of the Civil War to limit President Johnson's ability to implement his policy of conciliation with the states of the former Confederacy. The Act prohibited the President from removing a person holding civil office without the advice and consent of the Senate. President Johnson's unwillingness to abide by the terms of the Act, based upon his view that it was unconstitutional, led to his impeachment and trial before the Senate. In 1869, after the election of President Grant, the Act was modified to apply only to those persons appointed with the advice and consent of the Senate (as opposed to all civil officials). In 1887, the Tenure of Office Act was repealed.

Before this Court, Parsons, who was appointed as a U.S. Attorney for a term of four years, argued that he could not be removed during his term of office for any reason, while the president argued that the goal of the repeal of the Tenure of Office Act was to enlarge the president's removal authority. This Court found that the term of office set forth in the statute under which Parsons was appointed was a limitation on the period he would serve, not a grant of tenure. *Parsons,* 187 U.S. at 342. This Court based its decision upon the president's argument that the repeal of the Tenure of Office Act was intended to give the president more power, not less power, to remove certain officials:

> we are satisfied that [Congress's] intention, in the repeal of the tenure of office sections of the Revised Statutes, was again taken to concede to the president the power of removal, if taken from him by the original tenure of office act, and by reason of the repeal to thereby enable him to remove an officer when, in his discretion, he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office.

Parsons, 187 U.S. at 342-43. Thus, while *Parsons*, because of the special facts underlying the decision, does not necessarily stand for a general statement that fixed terms can be ignored, it can be interpreted in that fashion as did the Court of Appeals below.

Subsequently, in *Myers v. United States*, 272 U.S. 52 (1926), this Court addressed the Constitutionality of a provision that permitted postmasters, appointed with the advice and consent of the Senate, to be removed only with the advice and consent of the Senate. This Court found that as to purely executive officials (such as a postmaster), such a limitation on the president's removal authority was unconstitutional. In reaching that decision, the Court concluded, in dictum, that the language in *Marbury* regarding the sanctity of a fixed term was "obiter dictum" and if this "language was more than a dictum and a decision, then the Parson's Case overrules it." *Myers*, 272 U.S. at 142-43.[5]

In sum, given the conflicting language in this Court's previous decisions regarding the effect of a grant of a fixed term of office, this petition provides this Court with the opportunity to resolve the issue free of the separations of powers concerns that have complicated this Court's jurisprudence in this area. *Marbury, Hennen, Reagan, Shurtleff, Humphrey's Executor*

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5. The separate opinion of Justice McReynolds, *Myers*, 272 U.S. at 215-22, vigorously challenges the majority's conclusion that *Marbury's* holding regarding fixed terms is dictum or that that holding was overruled, as does the dissent of Justice Brandeis. *Id.* at 242-43. Justice Hughes agreed with the conclusions of both Justice McReynolds and Justice Brandeis. *Id.* at 177.

and *Wiener* all hold or state that Congress, by fixing a term of years, does mean to limit the removal power of the appointing authority. On the other hand, *Parsons, Myers* and the Court of Appeals below all reach the contrary conclusion.

The Court of Appeals' decision is particularly in need of review by this Court because of its significant impact upon the independence of interstate compact entities such as the DRPA. This Court has specifically determined that interstate compact entities such as the DRPA are tripartite arrangments between at least two States and the Congress, and thus are not tied to one particular state.[6] This Court should not permit *Parsons,* a result-oriented decision from a century ago, to eliminate the independence of interstate compact entities and render such entities nothing more than vassals of the Governors of the member states.

The inconsistency in this Court's decisions, outlined above, is not merely of academic interest, or of interst only to the DRPA, but presents a substantial and important federal question. Set forth in the Appendix at 67a, is a list of seventy-two federal statutes and interstate compacts in which the Congress enacted and/or approved of terms for officials in which a specific term is set forth and the provision at issue is silent on the question of removal. If the decision below is permitted to stand, it will enable appointing authorities to remove all persons appointed under such provisions with impunity and

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6. In *Hess v. Port Authority Trans-Hudson Corp.*, __ U.S. __, 115 S.Ct. 394 (1994), this Court determined that the interstate compact agency at issue (the Port Authority Trans-Hudson Corporation) should not be afforded Eleventh Amendment Immunity. In reaching that decision, the Court stated that "[b]ecause Compact Clause entities owe their existence to state and federal sovereigns acting cooperatively, and not to any 'one of the United States,' their political accountability is diffuse; they lack the tight tie to the people of one State that the instrument of a single State has: 'An interstate compact, by its very nature, shifts a part of a state's authority to another state or states, or to the agency the several states jointly create to run the compact. Such an agency under the control of special interests or gubernatorially appointed representatives is two or more steps removed from popular control, or even of control by a local government.' M. Ridgeway, Interstate Compacts: A Question of Federalism 300 (1971)." *Hess,* __ U.S. __, 115 S.Ct. at 401.

thereby poses a threat to the continued development of independent thought and consideration in agencies, commissions and interstate compact entities that at present may conduct themselves in a bi-partisan and non-political fashion.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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